

## Lycurgus to Moses: Thinking with Lawgivers in Legal and Political Philosophy

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### Lecture IV. Written laws? Ethical education in Plutarch's Lycurgus and related debates

Text A: Justinian, *Inst.*, trans. Moyle:

I.II.3: 'Our law is partly written, partly unwritten, as among the Greeks' (...*ius nostrum aut ex scripto aut ex non scripto...*)

I.II.9: 'The unwritten law is that which usage has approved: for ancient customs, when approved by consent of those who follow them, are like statute'. (*Ex non scripto ius venit quod usus comprobavit. nam diuturni mores consensu utentium comprobati legem imitantur.*)

I.II.10: 'And this division of the civil law (*ius civile*) into two kinds seems not inappropriate, for it appears to have originated in the institutions of two states, namely Athens and Lacedaemon [Sparta]; it having been usual in the latter [*sc. Sparta*] to commit to memory what was observed as law, while the Athenians observed only what they had made permanent in written statutes'.

NB: Greek terms for laws incl. *ta grammata* (the writings); *hē rhētra* (lit. speech). Justinian's contrast:

- Athenians wrote up Solon's laws; in 403 BCE: completed collection of their written laws.
- Spartans: did they rely on memory (and oral transmission) more / rather than on written laws?
  - o Did Lycurgus ban the writing down of his laws, as per Plutarch Life of Lycurgus, 13.1?
- Larger question: How to inculcate the fundamental ethical values of a constitution in a people: better by using written laws, or by relying on unwritten laws?
- 'partly written, partly unwritten': here, contrasting written laws v. unwritten memorized customs

	<b>Source</b>	<b>Mode of transmission (transmitter)</b>	<b>Mode of transmission (receiver)</b>
<b>Written laws</b>	Laid down by lawgiver	<i>Both sources:</i>  Public writing up / writing down of laws	<i>Both sources:</i>  Reading and study
	Made by formal civic process	Can include orality (Thomas 1992, 1996, 2005; others)  Can also include observation	Can include hearing (aurality)  Practice & imitation not excluded  Incorporation into memory: but not fully?
<b>'Unwritten laws'</b>  e.g. Pericles in Thuc.: which source?	Customs inherited by evolution	<i>All sources:</i>	<i>All sources:</i>
	Laid down by human lawgiver	Orality	Can include hearing (aurality)
	Laid down by gods Soph. <i>Antigone</i> performed 441. II. 454-5: <i>agrapha ... nomima</i> , made by gods; I. 450: <i>nomoi</i> made by Justice. Isoc. 4.55, 12.169: 'ancient custom and immemorial law' instituted in Athens by god	Observation	Practice & imitation for incorporation into memory: more fully?

## **PART I – Recap: the challenges to law; how writing can address and/or exacerbate them**

Lawgivers seek an ethical *telos*: includes justice & stability. 'Laying down' laws requires a form.

Affordances of the form of law: serves both justice (through generality) and stability (through fixity).

Text B: Fuller 1969: 23: '...the basic characteristic of law lies in its *generality*' (italics original)

Text C: Humphreys 1987: 217: '*Nomos* had to be something which did not easily change.'

But Achilles' heels (Lecture III): imprecision (flaw of generality) and inflexibility (flaw of fixity).

Text D: Eleatic Visitor, Plato, *Statesman* [*Plt.*] 294a10-c4 (trans. Rowe) – as in Lecture III:

'law could never accurately embrace what is best and most just for all at the same time, and so prescribe what is best...law...resembles some self-willed and ignorant person, who allows no one to do anything contrary to what he orders, nor to ask any questions about it, not even if...something new turns out for someone which is better, contrary to the prescription...laid down.'

Writing tends to double down on generality and fixity, and therefore also on imprecision and inflexibility.

Writing as a tool of law: is it a necessary one? Is there an alternative – in particular, 'unwritten laws'?

- Historians of early Greek law: some over-emphasize role of writing (claiming it necessary)
- Contemporary philosophers of law: some deny it is necessary (but may take it for granted)

Text E: Gagarin citing Hart (as on handout for Lecture I):

- i. 'Writing plays a crucial role in the transition from the pre-legal to the legal' (Gagarin 1986: 2, paraphrasing Hart and referencing Hart 1961: 92, which I believe is 2012: 94-95)  
vs.
- ii. '[T]he step from the pre-legal to the legal *may* be accomplished in distinguishable stages, of which the first is the mere reduction to writing of hitherto unknown rules'.  
(Hart 2012: 92, emphasis added)
- iii. While '[i]t *may*... be...that an authoritative list or text of the rules is to be found in a written document or carved on some public monument', this is 'not itself the crucial step'  
(Hart 2012: 94, emphasis added; 95) – promulgation not even necessary

Gagarin 2008: 3-4 now treats 'law both as conflict resolution and conflict regulation'; on 6 now notes that 'he [Hart] does not claim that recognition necessarily requires writing'; but Gagarin still contends that 'writing could be said to have created law for the Greeks – law, that is, in the sense of statutes'.

- Lane observation: the debate is about on uptake by citizens of norm-shaping laws (outer purpose of laws, served by 'inner morality' of legal form, in parlance of Lecture II)
  - o So problem of uptake is not limited to officeholders or to rule of recognition (as for Hart's view of acceptance / acknowledgement, though Lecture I took a broader view)
  - o Problem of uptake is to what extent the values / norms / actions of citizens & others can be shaped by the laws – and to what extent writtenness can help / hinder.
- Lane proposal: writing is tool for law. Coincident elective affinity in Greece. Idea of 'legalism'.

## **PART II in Overview – Some players in this debate: Athens; Plato; Sparta in Xenophon & Plutarch**

As per part of Lecture III, this lecture and the next are both especially interested in the Platonic *problématique* about the relationship among law, ethics and writing.

- A. Athenian approaches to this nexus.
- B. Spectrum of Platonic approaches: written/unwritten both flawed, but both necessary.
- C. Then contrast Spartan history/accounts of Lycurgus by Plato, Xenophon and Plutarch.
  - Plato: assumes that Lycurgus like Solon wrote down (some) laws.
  - Xenophon: Lycurgus as lawgiver 'laying down' customs/ways of life.
  - Plutarch: claim that Lycurgus prohibited writing down his laws: uber-Platonizing move?

**PART III – Conclusion** [given below]; Pythagorean texts & Jewish Alexandria as transition to Lecture V.

## **PART II – Some players in this debate: Athens; Plato; Sparta in Xenophon & Plutarch**

Building on Lecture III, Lectures IV-V both interested in Platonic *problématique*: nexus law/ethics/writing.

### **A. Athenian approaches to the same nexus and critiques thereof (as background for Plato)**

1. Solon: did not prescribe the writing down of his laws; part of Athenian acceptance

Text F: Gell. *N.A.* II.12.i 'In those most ancient laws of Solon, which were engraved in Athens on wooden axles and were enacted by him, and which the Athenians made everlasting by the threat of legal and religious punishments.' (Fr. 93b, *The Laws of Solon*, ed. and trans. Leão & Rhodes)

2. Late 5<sup>th</sup> century Athens doubled down on this requirement:
  - Written collection of all laws (begun post-411, completed in 403 BCE)
  - No law to be cited in jury trials that was not in this collection: Andok.1.87

Text G: Lys. 30. *Nicomachus 2: anagrapheis* appointed in 410/09 'to write up the laws of Solon' (Leão & Rhodes 3)

Text H: Andok. 1.81, trans. Maidment, recalling situation when democracy was restored in 403 BCE: 'you [sc. jurors/Athenians] elected a commission of 20 to govern Athens until a fresh code of laws had been authorized; during the interval the code of Solon and the statutes of Draco were to be in force'.

Text I: Andok. 1.87, trans. Maidment: "Laws. In no circumstances shall magistrates enforce a law which has not been inscribed. No decree, whether of the Council or Assembly, shall override a law. No law shall be directed against an individual without applying to all citizens alike, unless an Assembly of six thousand so resolve by secret ballot"... "Laws. All decisions given in private suits and by arbitrators under the democracy shall be valid. But of the laws only those passed since the archonship of Euclides [i.e. after restoration of democratic constitution] shall be enforced".

3. Post-403 fixity of laws led to critiques (Wallace 2007, though wrong on Plato), e.g.

Text J: Isocrates, claiming ancient Athenian Areopagus Council of Solon's day was opposed to *poleis* with many / overly specific laws (implicitly, 4<sup>th</sup> c. Athens), because such laws do not promote virtue as do 'the habits of everyday life' (*tōn...epitēdeumatōn*) (7.39-40, trans. Norlin)

Cf. Text K: (Pseudo-) Archytas, *On Law and Justice*: 'And the law should be inscribed not in temples or on doors, but in the characters of those who are its citizens. For not even in Sparta, which has the best laws, is the state managed by a multitude of writing but rather much more by the customs of those who are its citizens'. (F4 Stobaeus 4.1.138 pp.85.10 88.4 Hense=Thesleff 1965: 34.15 35.30; trans. Horky and Johnson)

- B. **Spectrum of Platonic approaches:** written/unwritten both flawed, but both necessary.

- Statesman:

- Both written & unwritten laws vs. statesman's precise flexible knowledge.
- Specific thought-experiment of city entirely governed by written laws and banning inquiry: *reductio* of 4<sup>th</sup> c. Athenian fixed written laws?

Text L: *Plt.* 295a-b: The lawgiver 'will never be capable, in prescribing for everyone together, of assigning accurately to each individual what is appropriate for him'; 'Instead he will, I think, set down the law for each and every one according to the principles of "for the majority of people, for the majority of cases, and roughly, somehow, like this", whether expressing it in writing or in unwritten form, legislating by means of ancestral customs'.

Text M: 298aff. Thought experiment: includes: 'once there was a record, on *kurbeis* or blocks of stone of some sort, of what the majority had decided...then all our sailing and caring for patients for all future time would have to be done according to this, along with certain other rules established as unwritten ancestral customs...' and 'let's suppose that...those who take office should execute it by steering the ships and healing patients according to the written rules'.

- Phaedrus: critique of writing as undermining habituation and as inflexible – and passive:

Text N: 274e6ff: Egyptian god Theuth's discovery of writing as 'drug for memory & for wisdom'; but Egyptian king Thamus: writing in fact undermines memory & so formation of habits.

Text O: 275d1-2: writing is at best a reminder. But dangers: inflexibility (making it indiscriminate) and passivity.

Text P: 276a5-7: by contrast, the discourse that is 'written down, with knowledge, in the soul of the learner' is protected against both passivity and imprecision: 'it can defend itself, knowing to whom it should speak and to whom it should remain silent'.

- Laws (Nomoi): double down: writtenness + reading/memory (+ unwritten) = full incorporation.
  - o New hypothesis for doubling down: fixity aids memorization and internalization, which can lead to precise ethical actions being taken (precision filters through to agents).

Text Q: 7.811d5-e1 (trans. Griffith): 'our discussion has altogether been very like a literary composition...For our guardian of the laws, our educator, I couldn't...ask for a better model than this, than that he instruct his teachers to give the children this teaching...'

Text R: 12.957c7-d7 (trans. Griffith): 'for other forms of discourse...the writings of the lawgiver are a sure touchstone. The good judge should keep these in his head, as a kind of antidote to other forms of discourse, and so keep himself and the city on the straight and narrow...'

Text S: 7.793a-c: 'unwritten customs' and 'what people call "the law of their fathers"' as complements to law: 'the bonds that hold any political system together...if they are out of key, and get out of true, then they are like the timber supports which carpenters put in...' [as in Lecture III]

- Republic, Statesman & Laws: in practice, even in discursive legislation, *politeiai* require laws, and elective affinity means that these are probably assumed to include written laws (not specified in *Republic*; *Statesman & Laws* both include both, but with emphasis on written).

### C. Spartan history / accounts of Lycurgus by Plato, Xenophon and Plutarch

1. Spartan history: no inscribed laws survive; evidence of relatively few writings. Boring 1971. But does this mean that we should accept Plutarch's claim in *Lyc.* 1.31? Millender 2001.
2. Plato: assumes that Lycurgus like Solon wrote down (some) laws. Cf. (later) Paus. 5.4.5.

Text T: Plato, *Leg.* 858e3-4: '...Lycurgus and Solon, and all those who have become lawgivers (*nomothetai*) and have written down written laws?' (trans. Lane). See Bertrand 1999: 73.

3. Xenophon: Lycurgus as lawgiver 'laying down' customs/ways of life: e.g.

Text U: *Lak. Pol.* 6.4: *tithenai* the *epitēdeumata*; 5.1 (*nomotheteō*...); 7.1 (establishing *nomima*).

4. Plutarch: claim that Lycurgus prohibited writing down his laws: uber-Platonizing move?

Themes in connection with Berlin Lectures: travel; wise selection (4.1: laws from Crete).

Text V:

- *Lycurgus* 13.1 (all, trans. Perrin): 'None of his laws were put into writing by Lycurgus, indeed, one of the so-called 'rhetras' forbids it. For he thought that if the most important and binding principles which conduce to the prosperity and virtue of a city were implanted in the habits and training of its citizens, they would remain unchanged and secure, having a stronger bond than compulsion in the fixed purposes imparted to the young by education, which performs the office of a law-giver [more literally: which completes a lawgiver's ordering] for every one of them'.
- 13.2: 'And as for minor matters, such as business contracts, and cases where the needs vary from time to time, it was better, as he thought, not to hamper them by written constraints or fixed usages, but to suffer them, as occasion demanded, to receive such modifications as educated men should determine. Indeed, he assigned the function of law-making wholly and entirely to education'.
- 13.3: 'One of his rhetras accordingly... prohibited the use (*mē chrēsthai*) of written laws...'

But NB: use of writing otherwise in Plut. *Lyc.*:

- Lycurgus 'wrote down and collected Homer's poems' (4.4)
- Later kings insert a clause in writing into the Great Rhetra (6.4 – verb *parengraphō*)
- Lycurgus instituted use of writing by *grammateia* in elections (26.3)
- Lycurgus decision to leave Sparta: asks kings and senate, and people, to take 'oaths' to 'live according to' his *politeia* (29.3, *emmenein kai chrēsesthai*; 29.5, *chrēsthai*)

Text W: 'Sayings of Spartans' (*Moralia* 227b): "Being asked why he had not made use of written laws, he [Lycurgus] said, 'Because those who are trained and disciplined in the proper discipline can determine what will best serve the occasion (*tou kairou*)'.

Text X: 'Sayings of Spartans' (*Moralia* 221b), on Zeuxidamus, a 7<sup>th</sup> c. Spartan king: 'When someone inquired why they kept the laws in regard to bravery unwritten (*agraphous*) and did not have them written down and thus give them to young men to read, Zeuxidamus said, "Because the young ought to accustom themselves to deeds of manly valour, a better thing than to apply their mind to writings'.

So Plutarch's *Lycurgus* envisions a city without written laws, which Plato never explicitly did. Other Platonizing themes in *Lycurgus*: education from marriage and birth (14.1); no lawsuits (24.4); citizens not to practice trades (24.2); comparison to Platonic Demiurge (29.1). And: *Nomothetēmata*:

- *Nomothetēmata*: it is used in *Lyc.* for:
  - As noun for what Lycurgus lays down and calls 'rhetras' ('implying that they came from the god and were oracles') (13.6)
  - As noun for the parallel regulations made by other peoples (15.8)
- It is not listed as attested in the TLG before Plato. In Plato:

Text Y: *Plt.* 295d7-e2: 'Or would all such things, if they happened in the context of truly expert knowledge, cause altogether the greatest ridicule, in all spheres, for acts of legislation (*tōn nomothetēmatōn*) of this sort?' (trans. Rowe) [i.e. those preventing expert from ordering]

Text Z: *Resp.* 427b (trans. Grube/Reeve): Socrates says that the remaining part of *nomothesia* is for 'the Delphic Apollo', to 'enact the greatest, finest, and first of laws (*tōn nomothetēmatōn*)'.

NB that Hippocrates *de Arte* 2.3 also uses it, in a more pejorative sense: 'names for nature are conventions (*nomothetēmata*) imposed by and upon nature, whereas forms are not conventions (*nomothetēmata*) but outgrowths'. *Nomos / phusis* debate again.

### **PART III – Conclusion**

- Writing as a tool – not constitutive of (Greek) law.
- Writing as part of the 'modern state' form of 4<sup>th</sup> c BCE Greece. Idea of legalism.
- The problem of the form of law makes the lawgiver more than just normativity incarnated.

This opens door to written law that is internalized: Plato, *Laws*. Cf. Judaism. Compare Biblical texts:

Text α: Jeremiah 31:33: to the Israelites: you should 'inscribe' (using a form of the verb "to write") the biblical teaching 'upon their hearts'. (*Jewish Publication Society*, 1090)

Text β: Deuteronomy 6:9, quoted in the Jewish Shema prayer: '[And you shall] inscribe them [these words—which are commandments] on the doorposts of your house and on your gates'. (*Jewish Publication Society*, 389). NB: Hebrew: *u'ktavtam al mezuzot beitecha u'vsharecha*; Septuagint Greek: *...grapsete...epi tas phlias tōn oikiōn humōn kai tōn pulōn humōn* [city's gates].

Neo-Pythagorean texts, probably from Alexandria in the 1<sup>st</sup> c BCE / 1<sup>st</sup> c CE, reflecting Jewish presence:

Text γ: Pseudo-Diotogenes, *On Piety*: 'The laws should not be written on houses and doorways (*en oikēmasi kai thurōmasin*), but in the mores of the citizens. For what is the origin of the whole *politeia*? The upbringing of the youth'.

Text δ: (Pseudo-) Archytas, *On Law and Justice* 33: 'And [the law should be] present not on houses and doorways (*en oikēmasi kai thurōmasin*), but in the mores of the citizens'.

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